SALES OF GOODS STATUTES IN NEW YORK.

It would not be an easy task to assemble all of the New York statutes, which, at present, affect the sale of goods. They are so widely scattered, both in time and space, that even the Consolidated Laws have not brought all of them within hailing distance of each other. Possibly, the attempt to collect and publish them in a separate group would be worth making; but such is not the purpose of this article. Its object is to call attention to a few of the salient features of this somewhat incoherent mass of legislation, and to point out the most important changes which it has wrought in the law of sales.

Most Important Statutes.

Several of these are grouped in the Consolidated Laws under the title of Personal Property Law, and cover such topics as "Fraudulent Sales;"[1] "Contracts for the Conditional Sale of Goods;"[2] "The Uniform Sales Act;"[3] and "The Uniform Bills of Lading Act."[4] Liens on personal property and chattel mortgages are covered by the "Lien Law;"[5] while "The Uniform Law of Warehouse Receipts" has been made a part of the "General Business Law."[6] As intimated above, these statutes, important and comprehensive though they are, do not include all of the legislative provisions, which the practicing lawyer may need to consult in actions arising out of the sale of goods in this State.[7]

Sales in Bulk.

By the present statute[8] "the transfer of any portion of a stock of goods, wares or merchandise otherwise than in the ordinary course of trade, in the regular and usual prosecution of the transferrer's business, or the transfer of an entire such stock in bulk,

[1]Chapter XLI of Consolidated Laws, §§ 30-44.

[2]*Ibid.* §§ 60-67.

[3]*Ibid.* Art. 5 §§ 82-158, Laws of 1911, chapter 571.

[4]*Ibid.* Art. 7 §§ 187-241, Laws of 1911, chapter 248.

[5]Chapter XXXIII of Consolidated Laws, especially §§ 80-238.

[6]Chapter XX of Consolidated Laws, Art. 9.

[7]An idea of the numerous and widely scattered acts of the legislature, bearing on this topic, may be gained by the Table of Statutes cited in a recent book on Chattel Mortgages and Conditional Sales, by Griffin and Curtis. The table covers two pages of closely printed references.

[8]Personal Property Law §4.

shall be presumed to be fraudulent and void as against the creditors of the transferrer, unless the proposed transferee shall, at least five days before the transfer, in good faith, make full and explicit inquiry of the transferrer as to the names and addresses" of his creditors and give at least five days notice to each of such creditors of such proposed transfer.

In its original form the statute declared that such "sales shall be fraudulent and void," and was held to be unconstitutional, as depriving the seller of the equal protection of the laws, of liberty of contract and of private property.[9] After this decision, the statute was altered so as to declare a sale in bulk, of the kind specified, to be presumptively fraudulent and void. In this form, its constitutionality has been upheld by the Supreme Court.[10] and apparently recognized by the Court of Appeals.[11] Legislation of this kind has been enacted in many of our jurisdictions, and its constitutionality has been upheld as a rule.[12]

Conditional Sales.

The history of New York legislation upon this topic is well sketched in a recent judicial opinion, and the conclusion is reached that the present law was framed to protect the average conditional vendee against his own improvidence, as well as against the iniquitous and grasping vendor. It proceeds upon the theory, it is said, that people who buy furniture and other chattels on the installment plan are not in a position to make a fair bargain with the vendor. Their small means and their necessities place them at the vendor's mercy and compel them to accept his terms. A statute, therefore, which gives to the vendee thirty days after the vendor retakes the property within which to redeem it, and which requires the retaking vendor to sell the property upon notice to the vendee, as a condition of retaining payments which have been made towards the purchase price, is characterized as "beneficient legislation, founded on grounds of public policy for the protection of innumerable people," who are

[9]Wright *v.* Hart (1905) 182 N. Y. 330, 75 N. E., 404, 2 L. R. A. [N. S.] 338 with valuable note.

[10]Sprintz *v.* Saxton (1908) 126 App. Div. 421, 110 N. Y. Supp. 585; Seeman *v.* Levine (1910) 140 App. Div. 272, 125 N. Y. Supp. 184, aff'g. (1910) 121 N. Y. Supp. 645.

[11]Seeman *v.* Levine (1912) 205 N. Y. 514, 99 N. E. 158.

[12]Young *v.* Lemieux (1907) 79 Conn. 434, 65 Atl. 436, 20 L. R. A. [N. S.] 160; MacGreenery *v.* Murphy (1912) 76 N. H. 338, 82 Atl. 720, 39 L. R. A. [N. S.] 374 and note.

not to be permitted to waive its benefits.[13] The contract in this case provided that in the event of the failure of the payee to meet any of the stipulated payments, he would surrender the goods (household furniture); and permit the vendors to retake them, without process of law, and to retain all payments of money as rent or hire for the use of said goods while in the vendee's possession. The vendors were also authorized to sell the goods without notice to the vendee, who expressly "waived any and all existing statutes or any that may be enacted requiring notice of sale."

To what extent legislation thus interpreted has changed the common law applicable to conditional sales can be discovered easily, by comparing the decisions referred to in the last note with *Ballard* v. *Burgett*,[14] *Empire State Type Founding Company* v. *Grant*,[15] and *Harkness* v. *Russell*.[16] At common law possession by a conditional vendee does not confer apparent ownership. "It gives him no better opportunity to impose upon purchasers than that of an ordinary bailee." Under the statute, possession by a conditional vendee clothes him with apparent ownership as to subsequent purchasers, pledgees or mortgagees, unless the sale contract or a copy thereof be filed in accordance with the statutory provisions. At common law, payments made by a conditional vendee, who subsequently defaults, cannot be recovered from the vendor, though the latter retakes the goods. Under the statute, they are recoverable in certain cases.

Some Inconsistencies.

It would not be strange if the various statutes, relating to the sale of goods and referred to above—enacted as they were by different legislators—were found to contain inconsistent provisions. And such inconsistencies do exist.

For example, the Warehouse Receipts Law defines "value" as "any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor."[17]

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[13]Plumiera *v.* Bricka (1913) 48 N. Y. L. J. 2625, following and extending the rule laid down in Roach *v.* Curtis (1908) 191 N. Y. 387, 391, 84 N. E. 283. See Crowe *v.* Liquid Carbonic Co. (1912) 154 App. Div. 373.

[14](1869) 40 N. Y. 314.

[15](1889) 114 N. Y. 40, 21 N. E. 49. *Cf.* Hoe *v.* Rex Mfg. Co. (1910) 205 Mass. 214, 91 N. E. 154.

[16](1886) 118 U. S. 663, 7 Sup. Ct. Rep. 51. See the cases cited in the opinion.

[17]General Business Law § 142.

This definition was stricken out of the Uniform Sales Act and the Uniform Bills of Lading Act. As a result, the defrauded vendor of a warehouse receipt cannot recover it or the goods represented by it, from one who has taken it in good faith from the defrauding vendee for an antecedent debt; while the defrauded vendor of a bill of lading, or a document of title other than a warehouse receipt, or of goods not represented by a document of title, may recover. In other words, the great majority of sales of personal property remain subject to the doctrine of *Barnard* v. *Campbell*,[18] and kindred cases,[19] while a small minority of transactions are governed by the English doctrine that one who takes property in satisfaction of an existing obligation, or as security therefor, is a purchaser for value.[20]

Again, the Warehouse Receipts Act,[21] the Sales Act,[22] and the Bills of Lading Act,[23] contain substantially the same definition of a negotiable document of title, as follows:

"A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title."

These statutes do not agree, however, in their provisions as to those who may negotiate documents of title. The Bills of Lading Act permits a negotiable bill to be

"negotiated by any person in possession of the same, however, such possession may have been acquired if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery."[24]

That is, a thief or a finder of a bill of lading, which makes the goods deliverable to bearer, or which is indorsed in blank, can pass perfect title to the document, and to the goods represented by it.

On the other hand, the Warehouse Receipts Act,[25] and the Sales Act[26] provide:

[18](1874) 55 N. Y. 456, 14 Am. R. 289; (1874) 58 N. Y. 73, 79, 17 Am. R. 208.

[19]Stevens *v.* Brennan (1879) 79 N. Y. 254.

[20]Burdick on Sales (3rd ed.) 203, 204.

[21]General Business Law § 92.

[22]Personal Property Law § 108.

[23]*Ibid.* § 191.

[24]Personal Property Law § 217.

[25]General Business Law § 124.

[26]Personal Property Law § 113.

"A negotiable document of title may be negotiated—
(a) By the owner thereof, or
(b) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery."

This section does not put negotiable documents of title on a footing with bills and notes. Although they are in such form as to be negotiable by delivery, neither a finder nor a thief can pass a perfect title to them. If the transferrer is not the owner of the document of title, he must have been entrusted by the owner with its possession or custody, in order to pass good title thereto. The sections have wrought a considerable change in the law of this State, however. It is no longer necessary that the transferrer be entrusted with the document of title for the purpose of sale, as was the case under the Factors Act.[27] A cartman, an office boy, or a bailee of any kind, entrusted by the owner with the possession or custody of a negotiable document of title, running to bearer or indorsed in blank, is now in a position to convey a perfect title thereto.

Changes in Terminology.

The first section of the Sales Act introduces an important change in the terminology of this branch of our law. It discards the term "Contract of Sale," and substitutes for it the terms "Contract to Sell" and "Sale." The former is defined as "a contract whereby the seller agrees to transfer the property and goods to the buyer for a consideration called the price." The latter is defined as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."[28] It is true that "Contract of Sale" appears in the definition of "Future Goods" and of "Goods,"[29] but its appearance here is due, apparently, to an oversight; these definitions having been copied from the English Sale of Goods Act, and not subjected to critical revision.

Two reasons are assigned for substituting the new terms for

[27]Soltau *v.* Gerdau (1890) 119 N. Y. 380, 23 N. E. 864, 16 Am. St. R. 843; First National Bank *v.* Shaw (1874) 61 N. Y. 283.

[28]Personal Property Law § 82.

[29]*Ibid.* § 156.

the old. First, to bring out the "fundamental distinction in the law of sales between a contract to sell and a sale." Second, to get rid of a phrase introduced into our law from Pothier by Lord Blackburn's Treatise.[30] Neither of these reasons appears very convincing. Certainly, the fundamental distinction referred to would have been secured, by retaining "Contract of Sale" to designate a present sale, and adding the term "Contract to Sell." There can be no doubt that a sale, under this statute, is something more than a transmutation of title. It may be made for a consideration to be paid thereafter.[31] It is attended, in most cases, with various engagements of the seller, express or implied, as to title, quality and fitness.[32]

The second reason seems even less persuasive than the first. Lord Blackburn's book appeared in 1845. Chancellor Kent had given currency to the expression, "Contract of Sale," in the second volume of his Commentaries, published as early as 1832,[33] although he did not introduce it. On the other hand, it had long been in common use by the bench and bar.[34]

The terms "Conditions" and "Warranties" are accorded different significations in the Sales Act, from those which the New York courts had attached to them. While our courts were not always consistent in their use of these terms, as a rule they treated a promissory condition as an essential term of the contract to sell, and not as collateral to its main purpose of transferring title to the subject matter of the sale. Accordingly, in a contract to sell and buy a specified quantity of "No. 1 extra foundry pig iron of the Coplay Iron Company make," the description of the iron was a promissory condition, upon the breach of which by the seller, the buyer could refuse to take and pay for the iron which was tendered, and could maintain an action for damages for the seller's breach of his promise;[35] but he could not waive the en-

[30]Williston on Sales page 2 and notes.

[31]"Even a sale, however, may still be a partly bilateral contract; that is, a contract in which some unperformed promise exists on each side though there has been some performance on one side as part of the consideration." Williston on Sales, page 765.

[32]See Personal Property Law §§ 94-97.

[33]Vol. 2, page 492 *et seq.* *Accord,* Shaw, *C. J.,* in Rowley *v.* Bigelow (Mass. 1832) 12 Pick. 307; and in Mixer *v.* Howarth (Mass. 1839) 21 Pick. 205; Spencer *v.* Cone (Mass. 1840) 1 Metc. 283; Barnes *v.* Bartlett (Mass. 1833) 15 Pick. 71, 77; Bement *v.* Smith (N. Y. 1836) 15 Wend. 493; Downs *v.* Ross (N. Y. 1840) 23 Wend. 270, 275.

[34]De Fonclear *v.* Shottenkirk (N. Y. 1808) 3 Johns. 170, 172; Farwell *v.* Smith (Mass. 1831) 12 Pick. 83, 87.

[35]Hamilton *v.* Ganyard (N. Y. 1866) 3 Keyes 45.

gagement as a condition, receive the goods with knowledge of their defects, and recover damages for the broken promise, as upon a collateral warranty.[36] Under the statute he may do this. Indeed, the Sales Act discards collateral warranties, and empowers the buyer to treat every warranty as a condition subsequent, with results which we shall refer to hereafter.

EXPRESS AND IMPLIED WARRANTIES.

The statutory definition of express warranty is entirely consistent with the prevailing judicial view, in this State. It reads as follows:

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty."[37]

Even the last sentence, which was not a part of the section in the original draft, and which is likely to cause rather than save litigation, does not appear to the writer to formulate a different doctrine from that announced by the Court of Appeals, in the following extract:[38]

"The court, in the charge to the jury, properly instructed them that the naked expression of opinion as to value of property made by the vendor is not a warranty upon which a recovery could be had; * * * Many circumstances in this case might properly be considered as bearing upon the question; the fact that the sale was not of a chattel, open to inspection by the purchaser, but of stock in a supposed corporation in another state; the assertion made by the vendor in connection with the statement of value, that he was one of the original or early stockholders, and that the stock was a dividend-paying stock (which was true only in a very limited sense); the fact that it was only after these statements were made that the plaintiff agreed to take the stock at its par value, saying to Mr. Poole: 'If the stock is all right, as you say, we will make the trade.' We think the jury might well have found, upon all the circumstances, that the assertion of Mr. Poole, as to the value and character of the stock, was something more than the expression of a mere naked opinion, and was intended to be and was relied upon as a warranty of the fact."

[36]Coplay Iron Co. *v.* Pope (1888) 108 N. Y. 232, 15 N. E. 335, followed in Heath Dry Gas Co. *v.* Hurd (1908) 193 N. Y. 255, 86 N. E. 18, 25 L. R. A. [N. S.] 160. For a critical examination of this doctrine see Conditions and Warranties in the Sale of Goods, 1 COLUMBIA LAW REVIEW 71.

[37]Personal Property Law § 93.

[38]Titus *v.* Poole (1895) 145 N. Y. 414, 426, 40 N. E. 228.

Passing from express to implied warranties, we find the statute making considerable changes in New York law. First, the implied warranty of title on the part of the seller is extended to every sale transaction,[39] and is not limited to cases where the seller is in possession of the goods when making the contract.[40] This change is not only in accordance with sound principle, but brings the law in this State into harmony with the modern view both in England and in this country. When a person offers an article for sale, whether it is in his possession or not, he offers to confer title to it upon the buyer, not to give to the latter simply a right to bring or defend a lawsuit against some other claimant to it.[41] Of course, if the seller does not offer to sell the thing, but only such interest in it as he is entitled to dispose of, no implied engagement as to title can arise; and such cases are expressly provided for in the statute.[42]

Again, the statute modifies New York law as respects the implied engagements of the seller concerning the fitness of goods for a particular purpose and their merchantability. The provisions are as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."[43]

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[39]Personal Property Law § 94 (1).

[40]McClure *v.* Central Trust Co. (1898) 28 App. Div. 433, 437, reversed on another ground (1900) 165 N. Y. 108; Scranton *v.* Clark (1868) 39 N. Y. 220, 100 Am. Dec. 430; McCoy *v.* Artcher (1848) 3 Barb. 323, 330. In the last cited case, the reasons for the New York doctrine are thus stated: "A warranty should only be implied when good faith requires it. I think it fair and equitable to hold that the possession of the vendor is equivalent to an affirmation of title, and that in such case the vendor shall be held to an implied warranty of title, though nothing be said on the subject, between the parties. But if the property sold be, at the time of the sale, in the possession of a third person, and there be no affirmation or assurance of ownership, no warranty of title should be implied. If, however, there be an affirmation of title where the vendor is not in possession, the vendor should be subjected to the same liability as if he had the possession of the property."

[41]See cases cited in Burdick on Sales (3rd ed.) 110-113.

[42]Personal Property Law § 94 (4).

[43]Personal Property Law § 96 (1) (2).

In the leading case of *Hoe* v. *Sanborn*,[44] the Court of Appeals held that upon the sale of a chattel by the manufacturer, a warranty is implied that the article sold is free from any latent defect, growing out of the process of manufacture. Where, however, there is a latent defect in the materials employed, the manufacturer is liable, as upon implied warranty, only where it is proved or is to be presumed that he knew of the defect. The engagement of the manufacturer, it will be observed, is not an absolute one that the goods which he has undertaken to supply for a particular purpose, are reasonably fit for that purpose; but only that they are free from latent defects (rendering them unfit) due to the process of manufacture, and to defects in materials which were known to him, or which he would have discovered had he exercised due care. According to this case, the theory of the common law in respect to implied warranties, rests upon the deceit of the vendor in not disclosing defects of which the probability of his knowledge is so great that its existence is presumed. Hence, "a dealer does not impliedly warrant against latent defects, except where the sale of the article by him is in and of itself legally equivalent to a positive affirmation that the article has certain inherent qualities inconsistent with the claimed defects." Save in this narrow class of cases, the dealer is not responsible for latent defects, rendering the article unfit for the particular purpose to which it is to be put by the purchaser, in the absence of an express warranty or fraud.[45] All of this is changed by the statute. One who sells goods, whether he is a grower, manufacturer or dealer, engages that they are reasonably fit for the particular purpose for which they are bought, when it appears that the buyer relies on the seller's skill and judgment; and, if the goods are sold by description, he engages that they are merchantable goods of that description.[46]

REMEDY FOR BREACH OF WARRANTY.

Upon this topic the law of New York has been radically changed by the statute. Our courts had followed *Thornton* v.

[44](1860) 21 N. Y. 552, 78 Am. Dec. 163.

[45]American Forcite Powder Co. *v.* Brady (1896) 4 App. Div. 95, 38 N. Y. Supp. 545 (powder unfit for use in blasting); Healy *v.* Brandon (1892) 66 Hun 515, 50 N. Y. St. Rep. 152 (hides unfit for tanning).

[46]See Personal Property Law § 95 and Bristol Tramways Co. *v.* Fiat Motors L. R. [1910] 2 K. B. 831, 79 L. J. K. B. 1107, applying the same provisions in the English Sale of Goods Act.

Wynn[47] and *Street* v. *Blay*,[48] in holding that the only remedy for a breach of warranty, as distinguished from a breach of condition, was an action for damages. As early as 1842, the rule was stated by the Supreme Court in the following terms:

"Where there is a warranty on a sale of goods without fraud, and no stipulation in the contract that the goods may be returned, the vendee has no right to annul the contract without the consent of the vendor. The only remedy is by an action on the warranty."

The court added:

"Even where a contrary principle has been acted on, it seems to have been done rather out of deference to local custom operating an exception to the common law of England, than as impugning the correctness of the general rule."[49]

Under the statute, what the court understood to be "a local custom operating an exception to the common law" has become the law itself, as shown by the following section:

"1 Where there is a breach of warranty by the seller, the buyer may, at his election,

(a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price;

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return

[47](1827) 12 Wheat. 183, 193. "If the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time."

[48](1831) 2 B. & Ad. 456, 462. "It is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, re-vest the property in the seller, and recover the price when paid, nor, by the same means, protect himself from the payment of the price."

[49]Voorhees *v.* Earl (1842) 2 Hill 288. The same doctrine has been asserted recently in other States. Hafer *v.* Cole (Ala. 1912) 57 So. 757, 759: "By the weight of authority, the vendee cannot, in the absence of fraud or an agreement giving him the right, rescind an executed contract of sale for mere breach of warranty; his remedy in such cases being on the warranty." Gay Oil Co. *v.* Roach (1910) 93 Ark. 454, 125 S. W. 122, 27 L. R. A. [N. S.] 914, 137 Am. St. R. 95; McCormick Harvesting Machine Co. *v.* Fields (1903) 90 Minn. 161, 95 N. W. 886: "A breach of warranty does not rescind a sale, or give the vendee a right to rescind, but merely a right of action for damages." Poirier Mfg. Co. *v.* Kitts (1909) 18 N. D. 556, 560, 120 N. W. 558.

them or offer to return them to the seller and recover the price or any part thereof which has been paid.

2 When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

3 Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time when the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale."[50]

It will be observed that subsections 1 (a) and (b) reject the doctrine applied in the *Coplay Iron Company* and the *Health Dry Gas Company Cases*, referred to in an earlier part of this article and put the law in this State in accord with that prevailing in England, and in most of our jurisdictions. Subdivision 1 (c) works no change. Subdivision 1 (d) permits a rescission in any case of warranty, without respect to its importance (thus differing from the rule in Louisiana[51]); and whether the title has passed or not. Subdivision 3 limits the exercise of the right of rescission, somewhat, and promises to be a fruitful source of litigation in cases where the vendee seeks to rescind. Subdivision 2 is also restrictive upon the vendee. If he rescinds, for the breach of any sort of warranty he cannot recover damages; and he must return the goods or offer to return them to the seller. Subdivisions 4 and 5 contain rules for determining the rights of parties, after rescission by the purchaser, and subdivisions 6 and 7 regulate the question of damages where the sale transaction is not rescinded.

STATUTE OF FRAUDS.

Here again The Uniform Sales Act works a considerable change in New York law. Before its passage the test applied by our courts for determining whether a particular contract was one for the sale of goods, and thus within the statute, or one for work,

[50]Personal Property Law § 150. Subsections 4, 5, 6 and 7 are not reprinted above.

[51]In that State, the buyer is entitled to rescind only when the defect in the goods is such that had they been known to the buyer he would not have purchased. Melançon *v.* Robichaux (1841) 17 La. [o. s.] 97. If the buyer retains the property with knowledge of its defects he is entitled to commensurate reduction in price. Templeman Bros. L. Co. *v.* Fairbanks, Morse & Co. (1912) 129 La. 983, 57 So. 309.

labor and materials, and thus without the statute, was the "deliverability test." If the goods were *in solido* at the time of the contract, and thus deliverable, the transaction was for the sale of goods; but if the goods were to be made thereafter, it was for work, labor and materials.[52] The statute substitutes for this a modified form of the "special order test" of the Massachusetts courts, as follows:

"The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."[53]

If a change were to be made from existing law, it seems unfortunate not to have adopted without change the English rule on this topic, as formulated in *Lee* v. *Griffin*,[54] and the Sale of Goods Act.[55] This rule has been declared absolutely logical[56] and the one to be preferred upon principle.[57]

Other important changes in the law of sales in New York have been wrought by the statutes referred to at the opening of this article; but enough have been pointed out to convince the practitioner that he needs to make a thorough study of their provisions, before undertaking to advise his clients or to conduct a litigation in this branch of the law. Not a little of the learning which he acquired in former years is now in sore need of revision and correction.

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[52]Downs *v.* Ross (1840) 23 Wend. 270; Cooke *v.* Millard (1875) 65 N. Y. 352.

[53]Personal Property Law § 85 (2).

[54](1861) 1 B. & S. 272. Lord Blackburn said: "I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labour done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered."

[55]56 and 57 Vict. chapter 71 § 4 (2).

[56]Williston on Sales § 55.

[57]Dwight, *C.* in Cooke *v.* Millard (1875) 65 N. Y. 352, 360.